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United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 | DAMION JAY PHILLIPS,

Defendant.

CASE NO. 2:20-CR-00207-JAM

**STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER**

DATE: March 2, 2021

TIME: 9:30 a.m.

COURT: Hon. John A. Mendez

This case is set for a status conference on March 2, 2021. On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in the Eastern District of California “until further notice,” and allows district judges to exercise their discretion to continue all criminal matters on a case-by-case basis. This and previous General Orders were entered to address public health concerns related to COVID-19.

22 Although the General Orders address the district-wide health concern, the Supreme Court has
23 emphasized that the Speedy Trial Act's ends-of-justice provision "counteract[s] substantive
24 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
25 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
26 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
27 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
28 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally

or in writing”).

Based on the plain text of the Speedy Trial Act—which Zedner emphasizes as both mandatory and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767–68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules. In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4).¹ If continued, this Court should designate a new date for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, hereby stipulate as follows:

¹ The parties note that General Order 612 acknowledges that a district judge may make “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

1. By previous order, this matter was set for status on March 2, 2021.

2. By this stipulation, defendant now moves to continue the status conference until April 6, 2021, and to exclude time between March 2, 2021, and April 6, 2021, under Local Code T4.

3. By this stipulation, the parties also request that the Court vacate the previously adopted briefng schedule for a motion to suppress and, instead, adopt the below briefng schedule:

6. a) The defendant shall file any motion to suppress by April 6, 2021;

7. b) The United States shall file any opposition by April 20, 2021; and

8. c) The defendant shall file any reply by April 27, 2021.

9. 4. The parties further agree and stipulate, and request that the Court find the following:

10. a) The government has represented that the discovery associated with this case includes investigative reports and related documents, criminal history documents, and other paper documents, along with several photographs and video files provided by the California Highway Patrol. The government has also obtained certain files from a cell phone belonging to defendant that was searched pursuant to a warrant issued by this Court. All of this discovery has been, or soon will be, either produced directly to counsel and/or made available for inspection and copying.

17. b) In light of this discovery, counsel for defendant desires additional time to consult with his client, to review the current charges, to conduct investigation and research related to those charges, to review and copy discovery for this matter, to inspect physical evidence seized and/or otherwise available concerning this matter, to discuss potential resolutions with his client, to consider and/or prepare pretrial motions, and to otherwise prepare for trial.

22. c) Moreover, in addition to the general public-health concerns cited by General Order Nos. 611 and 612 issued by this Court on March 17 and 18, 2020, and presented by the evolving COVID-19 pandemic, which the parties incorporate herein, an ends-of-justice delay is particularly apt in this case because counsel have been encouraged to telework and minimize personal contact to the greatest extent possible, and—consistent with that public-health guidance—it will be difficult for defense counsel to fully investigate the facts of this case in advance of the currently scheduled hearing.

1 d) Counsel for defendant believes that failure to grant the above-requested
2 continuance would deny him the reasonable time necessary for effective preparation, taking into
3 account the exercise of due diligence.

4 e) The government does not object to the continuance.

5 f) Based on the above-stated findings, the ends of justice served by continuing the
6 case as requested outweigh the interest of the public and the defendant in a trial within the
7 original date prescribed by the Speedy Trial Act.

8 g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
9 et seq., within which trial must commence, the time period of March 2, 2021 to April 6, 2021,
10 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4]
11 because it results from a continuance granted by the Court at defendant's request on the basis of
12 the Court's finding that the ends of justice served by taking such action outweigh the best interest
13 of the public and the defendant in a speedy trial.

14 5. Nothing in this stipulation and order shall preclude a finding that other provisions of the
15 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
16 must commence.

17 IT IS SO STIPULATED.

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20 Dated: February 24, 2021

McGREGOR W. SCOTT
United States Attorney

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22 _____
23 /s/ AARON D. PENNEKAMP
24 AARON D. PENNEKAMP
25 Assistant United States Attorney

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28 Dated: February 24, 2021

/s/ DOUG BEEVERS
DOUG BEEVERS
Counsel for Defendant
DAMION JAY PHILLIPS

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2 **FINDINGS AND ORDER**
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5 IT IS SO FOUND AND ORDERED this 24th day of February, 2021.
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10 /s/ John A. Mendez
11 _____
12 THE HONORABLE JOHN A. MENDEZ
13 UNITED STATES DISTRICT COURT JUDGE
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